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No. 83-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the 1980 Arizona Groundwater Management Act, A.R.S. §45-401 *et seq.*, deprived petitioners, without compensation, of valuable rights to groundwater, which were in the nature of property interests under Arizona law.

2. Whether the decision of the Arizona Supreme Court in *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982), in its effort to sustain the 1980 Groundwater Management Act, re-defined the nature of property rights in groundwater in such a drastic and unpredictable fashion as to itself deprive petitioners of their property without due process of law.

3. Whether the Arizona legislature's conclusive determination, without administrative or judicial recourse for relief, that petitioners' lands possess characteristics justifying the imposition of strict groundwater pumping and usage regulation deprives petitioners of due process of law.

4. Whether the Arizona legislature improperly delegated to an unidentified administrative official authority to define, subject to no legislatively prescribed standards whatsoever, the portions of the state to be subjected to the Act's regulations.

PARTIES INVOLVED

The plaintiffs-appellants in the court below, petitioners herein, are Clifton N. Cherry, Betty G. Cherry, Buck Jensen, Esther Jensen, Elmer Young, Lavera W. Young, Young Acres, Inc., Verde P. Cain, Helen C. Cain, Norman W. Fain, Johnny Lee Fain, Norman W. Fain, II, Nancy Fain, Shamrock Water Company, and Fain Land & Cattle Company. The defendants-appellees were Wesley E. Steiner, Director of the Arizona Department of Water Resources; Rose Mofford, Secretary of the State of Arizona; and, Patsy Jenney, Recorder of Yavapai County, Arizona.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Clifton N. Cherry, *et al.* [1] hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 716 F.2d 687. [2] The opinion of the district court (Appendix B) is reported at 543 F. Supp. 1270.

[1] The petitioners are listed under PARTIES INVOLVED, *supra*, as required by Rule 21.1 (b) of this Court.

[2] Due to the length of the materials required by Rule 21.1 (k) to be included in an Appendix, a separate volume of Appendices is submitted with this Petition.

JURISDICTION

The judgment and opinion of the court of appeals was issued on September 22, 1983. (Appendix A). A timely petition for rehearing was denied, and a companion suggestion of the appropriateness of rehearing *en banc* rejected, by order of the court of appeals, entered on November 14, 1983. (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fifth amendment to the Constitution, *U.S. Const.* amend. V, provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The provisions of the 1980 Arizona Groundwater Management Act, codified in Title 45, Arizona Revised Statutes, Sections 45-401 *et seq.* have been set forth in Appendix D.

STATEMENT OF THE CASE

This case concerns the validity of the 1980 Arizona Groundwater Management Act (hereinafter "the 1980 Act" or "the Act"), a purportedly conservationist measure passed by the Arizona legislature in a one-day special session held on June 11, 1980, and signed into law by the Governor the

following day.[3] The Act is a complex piece of legislation whose avowed purpose was to "conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use groundwater in [Arizona]." §45- 401(B) (App. D, p. D-1)

The linchpin of the Act's regulatory scheme is the creation of "Active Management Areas" (hereinafter "AMAs"), which supposedly encompass relatively distinct hydrological bodies or related bodies of water, termed groundwater basins or sub-basins. §§45-402(2), (27); 412(B) (App. D, pp.D-1, 5,11,12). The Act governs all withdrawals and uses of groundwater, §45-451 (App. D, p.D-24), except for very small wells drawing water for domestic purposes. §§45-402(7), 454 (App.D., pp.D-2, 28),[4] and severely limits who can withdraw groundwater within an AMA.

Initially, "the right to withdraw or receive and use groundwater" within an AMA may be extended only to "a person who was legally withdrawing and using groundwater *as of the date of designation* of the active management area or who owns land legally entitled to be irrigated with groundwater . . ." (emphasis added). §45-462(A)(App. D., p. D-30).[5] In addition, out of those actually drawing or using

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[3] The provisions of the Act are quite voluminous and, accordingly, they have been set forth in Appendix D. The Act is codified in Title 45, Arizona Revised Statutes. Sections 45-401, *et seq.* References herein to particular provisions of the Act will be to its Section number in Title 45.

[4] Management goals are established by the Act for each area, to be achieved through a series of five-year plans promulgated by the Director of the Department of Water Resources (the "director"). The goal for the Prescott Initial Active Management Area is to achieve "safe yield" (a balance between annual groundwater withdrawals and recharge) by the year 2025. §§45-561, 562 (App. D., pp. D-79, 80).

[5] As is explained hereinafter, the Act itself created four "initial AMAs". For these "initial AMAs", one of which includes petitioners' lands, the date of designation was the effective date of the Act—June 12, 1980.

groundwater on the date of the AMA's creation, only three classes of persons are permitted to continue to do so. One of these are cities and towns, and private water companies, which are granted virtually unlimited access to groundwater that can be reached from land within their service areas. §45-492(App. D., p. D-57). The second are persons who can qualify for withdrawal permits. §§45-511 *et seq.* (App. D., pp. D-63 *et seq.*).

The final group are some, but not all, of the private landowners who had withdrawn or used groundwater in the AMA prior to its establishment. §45-462 (App. D., pp. D-29, 30). Even these persons, however, must apply and qualify for one of three types of "grandfathered right" to use specified amounts of groundwater. §45-476 (App. D., p. D-49). A Type 1 non-irrigation right is available to owners of land retired from irrigation between 1965 and the Act's effective date. §45-463(A)(App. D., p. D-30). A Type 2 non-irrigation right is available to owners of land "from which groundwater was being withdrawn and used for a non-irrigation purpose" on the Act's effective date. §45-464(A) (App. D., p. D-32). An irrigation grandfathered right is extended to owners of land "legally irrigated at any time during the five years preceding January 1, 1980 . . ." §45-465(A) (App. D.,p.D-34).[6] All drawers of groundwater must pay an annual fee for that privilege, measured by the amount drawn. §§45- 611 *et seq.* (App.D, pp. D-109 *et seq.*)

The transportation of water away from the land from which it is withdrawn is also addressed by the Act. Such

[6] "Irrigation" is defined by the Act as the use of groundwater for agricultural purposes. "Irrigation grandfathered rights" may be granted to owners who legally irrigated their land in the five years prior to January 1, 1980. §45-465 (App. D., p. D-34). After the effective date of the Act, such an "irrigation grandfathered right" may not be converted to a "Type 1 non-irrigation right", by retiring the land from agriculture, unless the land lies outside the service area of a city, town or private water comoany. If the holders of "irrigation rights" own land in such a service area, and desire to devote the land to non-agricultural purposes, the right to use groundwater is lost. §§45-469, 472 (App. D., pp. D-39, 42).

water may be freely transported within a "sub-basin" of an active management area, and the transferor will not be liable for damages. §45-541 (App. D., p. D-77). Moreover, certain transfers may even be made outside sub-basins or even outside AMAs without the transferor being subject to an injunction or the payment of damages. §45-542 (App. D., p. D-77). The transportation of ground water away from the land from which it was pumped will subject the transporter to an award of damages only in very limited instances. §45-544(2) (App. D., p. D-79).

Under §45-576 (App. D., p. D-92 *et seq.*), the Act permits residential development only if the Director of the Department of Water Resources ("the director") issues a certificate of assured water supply, or the development is in an area designated by the director as having such an assured supply, which is statutorily defined, *inter alia*, to be a sufficient supply "to satisfy the water needs of the proposed use for at least one hundred years." §45-576(J) (App. D., pp.D-96, 97). A private water company may have its service area designated as having an assured supply by receiving an allocation of Central Arizona Project ("CAP") water, by making an unconditional offer to purchase such CAP water, and by convincing the director that it has undertaken to develop a delivery system for such water. To have its service area so designated, a city or town need only sign a letter of intent to contract for CAP water, regardless of whether it has actually contracted for such water or is in a position to receive it.

As noted, the pervasive restrictions which the Act imposes on the withdrawal and use of groundwater apply only to lands which fall within the boundaries of an AMA. The Act itself created and defined four initial AMAs: Phoenix, Tucson, Pinal and Prescott, the boundaries of which were purportedly delineated in maps described as on file in the Arizona Secretary of State's office on the Act's effective date. §45-411 (App.D,pp.D-10,11). As the district court correctly observed: "there are no administrative means for modifying the boundaries of the initial AMA's. This was

legislatively accomplished and can be modified only by the legislature." *Cherry v. Steiner*, 543 F. Supp. 1270, 1275 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983) (App. B, p. B-6).

The Act's geographic scope can, however, be administratively expanded, but in a fashion that contrasts sharply with the manner in which initial AMAs were created. The director is given the authority to include unregulated areas in "subsequent active management areas", but only if the lands in these areas are found to exhibit one of three criteria specified by the Act. §45-412 (App. D, pp. D-11, 12). Such a determination may only be made after a properly noticed public hearing, must be supported by published written findings, and is subject to judicial review. §§45-413, 414 (App. D, pp. D-12, 13). The director has authority to review and modify the boundaries of such subsequent AMAs, but must adhere to the same procedural requirements in doing so. §45-417 (App. D, p. D-16). There is no procedure in the Act, and the director is granted no authority, to alter or amend the boundaries of the initial AMAs.

Petitioners, plaintiffs-appellants below, are all landowners within the Upper Agua Fria Subbasin of the Prescott Initial Active Management Area created by the Act. All of their lands became immediately subject to the Act's restrictions upon its passage. Affidavits submitted to the district court, which have never been challenged or controverted, establish that the Act has deprived petitioners, to varying degrees, of the right to draw and use groundwater beneath their lands, and has caused each of them substantial economic loss, through the loss of investments in pumping and related equipment, deprivation of their legitimate development expectations, and drastic reductions in the fair market value of their land.

Petitioners commenced this action in the district court challenging the Act on various grounds, including that it deprived them of valuable property without just compensation, that it contained impermissible irrebuttable presump-

tions and similarly impermissible references to non-existent extrinsic documents. Petitioners sought, *inter alia*, a judgment declaring the Act unconstitutional as violating the due process and equal protection clauses of the Fifth and Fourteenth Amendements to the United States Constitution. The district court exercised jurisdiction under 28 U.S.C. §1331 and, upon consideration of cross-motions for summary judgment, granted summary judgment in favor of the defendants and the Act (Appendix B).

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit, which exercised jurisdiction pursuant to 28 U.S.C. §1291. The court of appeals issued its judgment and opinion, affirming the district court, on September 22, 1983 (Appendix A). The court of appeals addressed itself to only three issues. Initially, the court held that consideration of the constitutional questions presented was not foreclosed by this Court's summary dismissal of the appeal in *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), *appeal dismissed*, 457 U.S. 1101 (1982) *(Chino Valley II)*. [7]

The court of appeals then held that the decision of the Arizona Supreme Court was not a startling departure from its past pronouncements on the nature of private rights to groundwater, and could properly be considered by the district court. Finally, the court of appeals held that the district court had improperly foreclosed inquiry into whether the Act contained impermissible references to extrinsic documents, but conducted its own *de novo* review of the question and ruled in favor of the Act.

As to the balance of the questions presented, including the constitutional challenges to the Act, the court of appeals merely adopted the opinion of the district court. A timely petition for rehearing was denied by an order entered on November 14, 1983 (Appendix C).

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[7] This Petition does not question the propriety of this holding of the court of appeals, as that was the disposition urged by petitioners.

REASONS FOR GRANTING THE WRIT

The scarcity of water resources, and their consequent economic value, are not conditions peculiar to Arizona, but have continually plagued the entire Western region of the United States. As the rapid expansion of this area of the country continues and accelerates in the future, legislators will increasingly be called upon to devise schemes for allocating this scarce resource among increasing competing demands. The opinions below have sanctioned a most unfortunate model for those efforts.

Masquerading as a conservationist measure, the Act effectively obliterates private rights to groundwater which had been recognized by the Arizona courts as vested rights of property since the beginning of this century. By holding that this can validly be accomplished in the exercise of the police power, the decisions below have effectively signaled that private rights to property, in this case groundwater, may be forfeited at the whim or caprice of the legislature, and that the obvious constitutional problems can be avoided through the simple expedient of having the state courts change the definition of what constitutes protectible property interests.

This Court has already agreed to hear a case, *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted sub nom. Hawaii Housing Authority v. Midkiff*, ____ U.S. _____, 52 USLW 3342 (Oct. 31, 1983), which presents the question whether the taking of property from one owner and transferring it to another is a taking for a "public use." An even more compelling case for review is presented here, where the lower courts have held that such a transfer does not even constitute a "taking."

Finally, it is particularly important that this Court consider that question in a setting where the property involved is a valuable natural resource in a rapidly developing area of the nation. Water in the West is at once both scarce and essential — in Arizona, at least, waterless land is worthless land. There are a host of competing demands for this resource, not all of which can be satisfied. The danger

that those who want that resource can secure legislation taking it from those who own it is no longer fanciful—the 1980 Act accomplishes exactly that. As the court held in *Midkiff v. Tom, supra:*

> . . . it was the intention of the framers of the Constitution and the fifth Amendment that this form of majoritarian tyranny should not occur.

Id., 702 F.2d at 790.

I

IN ORDER TO UPHOLD THE ACT THE LOWER COURTS SANCTIONED PATENT EVASIONS OF THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS AND EXPANDED THE SCOPE OF THE POLICE POWER BEYOND BOUNDS PREVIOUSLY ESTABLISHED BY THIS COURT

The due process clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, contains the unequivocal mandate that "private property [shall not] be taken for public use without just compensation." *U.S. Const.* amend. V. The principal question presented in this case is whether the restrictions imposed by the 1980 Act upon petitioners' withdrawal and use of groundwater from beneath their lands transgressed that prohibition. In resolving that question, the lower courts were called upon to identify the nature and extent of petitioners' property rights to groundwater and the effect of the legislation upon those rights, and then to assess whether an unconstitutional taking had occurred.

A. Petitioners' Pre-Act Groundwater Rights

As the court of appeals correctly noted, the question of whether a particular interest adversely affected by legislation is a right of property is, under 28 U.S.C. §1652, a question of state law. Prior to the Act, Arizona law concerning rights to groundwater was virtually all decisional, and at least prior to the Arizona Supreme Court's decision in *Chino Valley II*, almost uniformly consistent—percolating groundwater

beneath the land was *owned* by the landowner and this constituted a valuable *property right.*

The subject was initially addressed in *Howard v. Perrin,* 8 Ariz. 347, 76 P. 460 (1904), *aff'd.,* 200 U.S. 71 (1906), when the Territorial Supreme Court characterized groundwater as "*a component part of the earth,* having no characteristic of ownership distinct from the land itself, and therefore not the subject of appropriation by another, but *belonging to the owner of the soil.*" 8 Ariz. at 353, 76 P. at 462 (emphasis added). This rule was reconfirmed by the Arizona Supreme Court in *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931), after an extensive review of the issue prompted by the court's recognition that the principles it was to announce would "govern . . . future agricultural development within the arid regions of Arizona" and "should be enunciated as clearly and definitely as possible, so that our citizens may know how to guide their future procedure . . ." 39 Ariz. at 71, 4 P.2d at 472. Cognizant of the task before it and its precedential significance, the court announced the following rule:

> . . . percolating subterranean waters [are] the property of the owner of the land, subject to the rules of the common law.

Id., 39 Ariz. at 78-79, 4 P.2d at 374.

That rule remained, with one brief *interregnum,* the governing principle of Arizona law concerning rights to groundwater until the decision in *Chino Valley II.*[8] This Court's oft-expressed desire for brevity in petitions of this

[8] The sole hiatus in an otherwise unbroken chain of judicial pronouncements of similar import was the decision in *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185(1952) *(Bristor I),* which repudiated earlier rulings and announced that *in futuro* the principle of prior appropriation would govern groundwater rights. *Bristor I* was promptly and emphatically repudiated on rehearing by the decision in *Bristor II, Bristor v. Cheatham,* 75 Ariz. 227, 255 P.2d 173 (1953), which articulated the "reasonable use" doctrine. (See discussion in text).

nature precludes an extended discussion of the subsequent decisions reconfirming the rule of *Southwest Cotton*. The following representative sample of excerpts from decisions of the Arizona Supreme Court will serve to demonstrate that *Southwest Cotton* retained its vitality until the aberrational departure in *Chino Valley II*:

> It is the law of Arizona that percolating waters belong to the owner of the land on which they are found. [9]
>
> * * * *
>
> It has been the recognized law of this state since 1904 that water filtrating or percolating through the soil beneath the surface of the land in undefined and unknown channels is a component part of the earth, having no characteristic of ownership distinct from the land itself and therefore belongs to the owner of the soil. [10]
>
> * * * *
>
> The doctrine [of *Bristor v. Cheatham*, 73 Ariz. 288, 240 P.2d 185 (1952)] was bitterly assailed on rehearing and the court then in deciding that the *owners of the land had a vested property right in the water underlying* unequivocally committed this state to the doctrine of reasonable use. . . . [11]
>
> * * * *
>
> The question presented for decision is whether the doctrine of reasonable use as it has heretofore been judicially determined in Arizona permits percolating waters to be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured or damaged thereby.

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[9] *Fourzan v. Curtis*, 43 Ariz. 140, 147, 29 P.2d 722, 725 (1934).

[10] *State ex rel. Morrison v. Anway*, 87 Ariz. 206, 208, 349 P.2d 774, 775 (1960).

[11] *Jarvis v. State Land Department*, 104 Ariz. 527, 529, 456 P.2d 385, 387 (1969) (emphasis added).

The principles controlling in this case have been set forth in detail and in unequivocal language by this Court in many decisions. Twenty-three years ago, on March 14, 1953, the Court published its decision on rehearing in Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953), in which it committed Arizona to the American doctrine of reasonable use. The decison emphasized that this State had adopted the principle of reasonable use 49 years before, and that whether the Court should after nearly 50 years under an announced rule depart from it depended upon may questions, the most important of which was *the protection of property rights acquired upon the faith of the Court's pronouncement of the law.* Our exact language was: (M)any and large investments have been made in the development of ground waters. *Under these circumstances the court's announcement of the rule becomes a rule of property.* ... and when a decision does become a rule of property, the rights acquired thereunder are entitled to protection under the law as declared. [12]

* * * *

At the outset it must be conceded that the interests which petitioners seek to protect are property rights. We recognized in *Farmers Investment Company v. Bettwy, supra,* that the doctrine of reasonable use as judicially determined in Arizona *had become a rule of property and was entitled to protection as such.* Under the doctrine of reasonable use property owners have the right to capture and use the underground water beneath their land for a beneficial purpose on that land, but no landowner can transport water off the land from which it came if the transfer injured the water supply of neighboring property owners. [13]

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[12]*Farmers Investment Co. v. Bettwy,* 113 Ariz. 520, 525, 558 P.2d 14, 19 (1976) (emphasis added).

[13]*Town of Chino Valley v. State Land Dep't.,* 119 Ariz. 243, 248, 580 P.2d 704, 709 (1978) *(Chino Valley I)* (emphasis added).

Prior to *Chino Valley II*, Arizona decisions had "unequivocally committed this state to the doctrine of reasonable use" and those decisions had become "a rule of property." As announced in *Southwest Cotton, supra*, and elaborated in *Bristor II*, the rule provides that: (a) percolating groundwater is the property of the owner of the overlying realty, (b) that landowner may withdraw groundwater and use it for a useful and beneficial purpose upon that land, (c) that landowner may withdraw groundwater and convey it away from the land for a useful and beneficial purpose, but only if (or to the extent) the groundwater resource of other landowners in the same area is not thereby damaged.

B. The Effect of the 1980 Act on Pre-Chino Valley II Groundwater Rights

It is of significance that neither the district court nor the court of appeals quarreled with the proposition that the 1980 Act severely limited the rights of petitioners' and others to the use of groundwater beneath their lands. This was not an inadvertent omission — the draconian effect of the Act on pre-existing rights to pump and use groundwater is clear and unequivocal.

Prior to the Act, Arizona case law conferred on Arizona landowners the following "bundle of rights" in groundwater percolating beneath their land.

a. The landowner owned groundwater beneath the land and had the right to withdraw it for any beneficial use on the land. *Bristor v. Cheatham (Bristor II), supra.*

b. The landowner could transport groundwater drawn from the land for any reasonable or beneficial use on other lands, so long as that use did not impair or damage the groundwater source of any adjoining landowner. *Jarvis v. State Land Department, supra.*

c. The landowner had remedies, in the form of an injunction or damages, against other users of the common groundwater supply who transported it for use on other lands and thereby impaired the original land-

owner's resource. *Bristor II, supra; Farmers Investment Co. v. Bettwy, supra; Jarvis, supra.*

It bears repeating that these rights were consistently characterized by the Arizona Supreme Court as having ripened into "a rule of property and ... entitled to protection as such." *Chino Valley I, supra,* 119 Ariz. at 248.

The effect of the Act on these rights is abundantly clear. Landowners lose their ownership rights in groundwater beneath their lands. In place of these ownership rights, certain landowners, *but not all,* receive the right to apply for a grandfathered right to use groundwater. Most importantly, the "grandfathered rights" regime is not co-extensive with the "ownership rights regime" which it replaced.

Prior to the Act, the landowner owned groundwater beneath the land, whether it was being withdrawn or not. Grandfathered rights, on the other hand, are only available to those *actually drawing groundwater* on the Act's effective date. §45-462 (App. D, pp. D-29, 30). Indeed, an irrigation grandfathered right is available only to those who used groundwater between 1975 and 1980. With respect to non-irrigation (developmental) uses, the limitation is even more drastic — a landowner within an AMA who was not withdrawing groundwater on June 12, 1980 *may not do so in the future.* The right to withdraw groundwater from beneath these lands for those purposes is irretrievably lost.

In that circumstance, the loss imposed by the Act is dramatic, because it is immediate. The landowner fortunate enough to be drawing groundwater for irrigation purposes on June 12, 1980 does not escape unscathed, however. The Act permanently eliminates for that individual all other options for use of the land if it lies within a water company's service area. If the landowner opts to abandon farming and to devote the land and its water to a non-irrigation use, all rights to draw groundwater from that land are forfeited. §§45-469, 472 (App. D, pp. D-39, 42).

The provisions of the Act governing the transportation of mined groundwater add an exacerbating dimension which both lower courts simply ignored. Under the Act, pumped groundwater may be transported within a sub-basin of an

AMA without subjecting the transporter to claims for an injunction or damages. Thus, those who pumped groundwater prior to 1980 and qualify for grandfathered rights, and cities, towns, and private water companies, may withdraw groundwater from the common supply under the appellants' land, and transport it for use elsewhere. If the common supply is thereby impaired, the adjoining landowners are powerless to prevent it, and are deprived of any legal recourse for the damages they suffer.

The principal beneficiaries of this arbitrary cutoff can be readily identified. They are other landowners fortunate enough to have been pumping groundwater when the Act became effective, and municipalities and private water companies who are given virtually unrestricted rights to pump groundwater within their service areas. This transfer of valuable property rights from one class of individuals to another is a clear consequence of the Act and is just as clearly indefensible. As the court held in *Midkiff v. Tom, supra:* "The sovereign may not take the private property of A and transfer it to B solely for B's private use and benefit." 702 F.2d at 793.

As noted, the lower courts did not even attempt to deny the confiscatory effect of the Act. Only the defendants-appellees engaged in that exercise and, in doing so, conceded the obvious. They offered the pallid defense that "no beneficial uses of groundwater which existed on the effective date of the Act . . . are prohibited . . . ", a transparent admission of the accuracy of petitioners' characterization of the Act's effect. They then suggested alternatives available to petitioners to secure groundwater for use on their land — principally, the purchase of additional land with grandfathered rights, the acquisition of grandfathered rights, and the purchase of service from a public or private water company. These alternatives share one common characteristic — all involve the purchase of water, water rights or land from others. It turns almost two hundred years of constitutional jurisprudence on its head to suggest that the taking of property rights without compensation is somehow cured by permitting the condemnee to purchase similar rights from others.

C. **Justifications for the 1980 Act**

As noted, neither the district court nor the court of appeals was persuaded by the transparent argument that the Act worked no meaningful deprivation of petitioners' groundwater rights. To the contrary, the lower courts relied on two separate but related propositions to find the Act defensible. The first was the notion that the rights of which petitioners were deprived did not constitute protectible "property". The second was that the deprivation could be justified by invoking the talisman of the "police power". Analysis shows both these rationales to be without substance.

1. **The non-property defense.**

Both lower courts implied, without expressly holding, that the rights to groundwater of which petitioners were deprived did not constitute protectible property interests, in light of the decision in *Chino Valley II*. That decision held, in the face of three quarters of a century of precedent to the contrary, that:

> . . . there can be no ownership in seeping and percolating waters until they are reduced to actual possession and control . . . Like wild animals free to roam as they please, they are the property of no one.

Chino Valley II, 131 Ariz. at 82, 638 P.2d at 1328. Reliance on *Chino Valley II* as sounding the "death knell" for constitutional challenges to the Act, as the district court concluded, *Cherry v. Steiner*, 543 F. Supp. at 1277 (App. B, p. B-10), is at once both improper and insidious.

Initially, even if one accepts *arguendo* the notion, first articulated in *Chino Valley II*, that an Arizona landowner's rights extended only to the *use* of groundwater, the question remains whether *that right* was unconstitutionally taken by the Act. This Court has previously held that:

> Confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title.

Chicago, R.I. & P.R. Co. v. United States, 284 U.S. 80, 96 (1931). *Accord, In re Forsstrum*, 44 Ariz. 472, 481, 488, 38 P.2d 878 (1934). Both the lower courts wholly failed to

assess the constitutional implications of the Act's undeniably restrictive effect on rights to the use of groundwater.

Perhaps more importantly, both lower courts failed to grasp and properly apply the rule that judicial decisions can themselves amount to unconstitutional deprivations of property when they enunciate rules of property which depart drastically from existing precedent. *See, e.g., Hughes v. Washington*, 389 U.S. 290 (1967) (Stewart, J., concurring); *Muhlker v. New York and Harlem R.R. Co.*, 197 U.S. 544, 569-571 (1905); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). The rationale for this rule has been cogently expressed by Mr. Justice Stewart "... a State cannot be permitted to defeat that constitutional prohibition against taking of property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington, supra*, 389 U.S. at 296-97 (concurring opinion).

The court of appeals recognized the rule but agreed with the district court, wihout elaboration, that *Chino Valley II* was not a "startling departure" from past judicial pronouncements. The district court based this conclusion on a perceived lack of clarity in prior Arizona law on the subject, which conclusion was in turn based entirely on the decision in *Southwest Engineering Co. v. Ernst*, 79 Ariz. 403, 291 P.2d 764 (1955).

That decision, however, concerned and sustained a provision of the 1948 Groundwater Code which prohibited the drilling of new groundwater wells for agricultural purposes in certain critical groundwater areas. In effect, that statute and that decision merely told certain Arizona landowners that they could not devote their property (groundwater) to one particular use. It certainly did not question the fact that the groundwater was owned by the landowners affected, and could be used for all other purposes. The limitation on new wells for one particular purpose sustained there is a far cry from the prohibition of any new withdrawals for any purpose which the 1980 Act imposes.

More significantly, the representative quotations set forth earlier are, with one exception, from Arizona decisions which were rendered *subsequent* to *Southwest Engineering*.

The decison in *Southwest Engineering* did not even purport to be inconsistent with *Southwest Cotton* and *Bristor II*, which preceded it; it certainly cannot be viewed as overruling or questioning decisions rendered twenty years later.

In its decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), this Court put to its final rest the notion that a federal common law could be created and applied by the federal judiciary. In light of that decision, and its partial codification in 28 U.S.C. §1652, it is appropriate that federal courts look to state law, at least initially, on property law questions. On the other hand, this deference to state law in property matters cannot lead, as it has in this case, to the abdication of the federal judiciary's role as the protector of federal constitutional guarantees.

To the contrary, the federal courts were admonished by this Court, in *Hughes v. Washington, supra*, to be watchful lest constitutional guarantees be thwarted through the subterfuge of redefining property rights under state law. That is precisely what this case entails. Groundwater in Arizona was declared in 1931 to be "the property of the owner of the land" (*Southwest Cotton, supra*, 39 Ariz. at 78-79, 4 P.2d at 374) and, by 1978, this "had become a rule of property and ... entitled to protection as such." (*Chino Valley I, supra*, 119 Ariz. at 248, 580 P.2d at 709). Only two years later, ownership was cavalierly re-defined as simply the defeasible right to possession, and constitutional difficulties thereby avoided. This is a clear departure from the rule enunciated in *Hughes v. Washington*, which this Court should now rectify.

2. **The "police power" justification.**

Although both lower courts persuaded themselves that no unconstitutional taking of property was presented by the 1980 Act, the district court's opinion, which the court of appeals essentially adopted, alludes to the equally erroneous notion that the Act could be sustained as a valid police power measure, even if vested rights of property were forfeited in the process. Such an Orwellian notion is at clear odds with virtually every precedent of this Court on the subject, and was explicitly rejected as recently as this Court's

decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979):

> In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking", however, *is an entirely separate question.*

444 U.S. at 174 (emphasis added).

The effect of the 1980 Act satisfies every test for a "taking" of property discussed by this Court in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Act denies to landowners not pumping groundwater on June 12, 1980 any right to do so in the future. That this will deny to those landowners "economically viable use" of their land and a "fundamental attribute of ownership" is hardly open to question. Moreover, a clearly disproportionate, if not the entire, burden of the Act falls upon that unfortunate category of landowners.

This Court found, in *Kaiser Aetna v. United States*, that an uncompensated "taking" of property resulted from the imposition of a requirement of public access to a private marina. Here, as noted earlier, water companies serving the public have been granted unlimited access to groundwater resources beneath petitioners' lands. The intrusion on property interests condemned by this Court in *Kaiser Aetna* pales in comparison.

The Act, as noted earlier, goes far beyond mere regulation of *the use* of groundwater and takes from private landowners their property interest in groundwater. The lower courts have effectively held that even an outright taking of private property, without compensation, can be justified under the police power. This Court has consistently rejected any such notion, commencing with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As the court noted in *Midkiff v. Tom, supra:*

> The Supreme Court has held that merely because the legislature has the power to regulate private property

> does not allow it to take property without just compensation. . . .

Id. 702 F.2d at 797.

Permitting "regulation" to proceed to the point of confiscation is, unfortunately, not the only instance where the lower courts here have departed from this Court's established guidelines. A persistent thread which runs through the "police power" decisions of this Court is that a state may not, directly or indirectly, transfer vested rights from one property owner to another. *See United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Midkiff v. Tom, supra.* Yet the 1980 Act accomplishes precisely that result.

Prior to the 1980 Act, Arizona landowners over common groundwater supplies owned and had the right to draw upon that supply, subject only to the doctrine of reasonable use. By depriving only certain of those landowners of the right to do so in the future, the 1980 Act confers upon others, and principally municipal and private water companies, the right to unfettered use of what previously was the disfavored owners' property. No decision of this Court has ever sanctioned such a result.

II

THE LEGISLATIVE CREATION OF INITIAL ACTIVE MANAGEMENT AREAS DEPRIVES LANDOWNERS THEREIN OF DUE PROCESS OF LAW

As noted earlier, the 1980 Act itself prescribed the initial AMAs which would be subject to its extensive and, in certain instances, confiscatory groundwater regulation. Subsequent AMAs can be created by the director upon a finding, after notice and a hearing and subject to judicial review, that land to be included therein exhibits one of the following characteristics:

> (1) Active management practices are necessary to preserve the existing supply of groundwater for future needs; or,
>
> (2) Land subsidence or fissuring is endangering property or potential groundwater storage capacity; or,

> (3) Use of groundwater is resulting in actual or threatened water quality degradation.

A.R.S. §45-412(A) (App. D, p. D-11). The Arizona legislature thus recognized that the inclusion of land within an AMA should be made on the basis of a particularized evidentiary showing, surrounded by traditional procedural protections.

The legislative creation of initial AMAs, on the other hand, represents a conclusive determination that all of the lands contained therein bear one of these characteristics. The presumption that all these lands satisfy these criteria is irrebuttable and permanent; there is no mechanism provided by which land in an initial AMA can, if circumstances change, be removed from it.

This is not a case where a legislature has enacted a statute of general application which affects the property of a certain class of owners. To the contrary, the 1980 Act represents a legislative declaration that certain specific lands shall forever be presumed to have certain specific characteristics, characteristics which as to all other lands must be shown only by evidence and at noticed hearings. Legislation of this character has been consistently found to be repugnant to the due process clause of the Fourteenth Amendment:

> Certain principles have remained immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Greene v. McElroy, 360 U.S. 474, 496 (1959). This rule was reconfirmed in *Vlandis v. Kline*, 412 U.S. 441 (1973), where this Court observed:

> Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Id., 412 U.S. at 446. *cf. also, Andrews v. Drew Municipal Separate School District*, 507 F.2d 611, 614 (5th Cir. 1975).

This was among the issues which the court of appeals chose not to address, relying instead on the district court's opinion. The district court simply refused to consider the question, relying mainly on its perception that: "this [irrebuttable presumption] doctrine is probably no longer viable in this circuit . . ." *Cherry v. Steiner, supra*, 543 F. Supp. at 1279 (App. B, pp. B-13, 14) (citing a footnote from *de Laurier v. San Diego Unified School District* 588 F.2d 674 (9th Cir. 1978)). A doctrine of constitutional dimensions, enunciated and applied by this Court, has cavalierly been consigned to a judicial scrap heap of the district court's own creation.

III
THE ACT WAS UNCONSTITUTIONALLY VAGUE AND INCOMPLETE AT THE TIME OF ITS ENACTMENT

As has been noted earlier, the central feature of the 1980 Act's regulatory scheme was the legislative creation of four "initial active management areas," which were defined solely as the areas delineated in "maps filed in the Office of the Secretary of State on the effective date of this [Act]." A.R.S. §45-411(B) (App. D, p. D-11). The Act was passed by the Legislature on June 11, 1980, and contained an emergency clause which made the law "immediately operative" upon approval by two-thirds of each house of the Legislature and approval by the Governor. *Ariz. Const.* art. 4, pt. 1, §1. The Act was signed by the Governor into law on June 12. The Act contained no delegation of authority to any official or entity to designate initial active management areas or to prepare maps.

At the time that the bill was passed by the Arizona legislature, on June 11, 1980, there were no maps on file with the Secretary of State. At the time the Governor signed the Act into law, there were no such maps on file. Subsequently, but still on June 12, 1980, some official transmitted maps to the

Secretary of State which defined the lands to be included in the four initial AMAs and subject to the Act's provisions.

Arizona, like many other states, adheres to the common law rule that a statute that is incomplete at the time of its enactment violates due process and is void. The Arizona Supreme Court has articulated the rule in the following fashion:

> An act must be complete in all its terms when it leaves the legislature; so that those charged with the administration of such act are amenable to the courts for failure to put it into effect or for its maladministration, and so that everyone may know by reading the law what his rights are and how it shall operate when put into execution; and the court cannot supply material and essential omissions.

State Compensation Fund v. de la Fuente, 18 Ariz. App. 246, 251, 501 P.2d 442, 447 (1972). *Cf. also, State ex rel. Weiks v. Tumwater*, 66 Wash.2d 33, 400 P.2d 789 (Wash. 1965).

The rule is not a mere "housekeeping" measure; it serves two important and related purposes. Initially, it is ancillary to the rules which circumscribe the delegation of legislative authority. Where a legislature wishes to incorporate into its enactments documentary materials produced by others, it can do so in one of two ways. It may delegate to others the authority to prepare those materials and specify that, when they are prepared or promulgated, they *ipso facto* become part of the legislation. If that option is selected, which it was not in this case, precise standards must be enacted to govern exercise of the delegated authority.

The other option is for the legislature to incorporate the documentary materials by an appropriate reference, and the "completeness" doctrine requires that those materials, as defined in the reference, actually be in existence. A legislative incorporation of documentary materials not yet in existence would be in effect a delegation of legislative authority, and subject to the rules governing that option. The purpose of the "completeness doctrine", which requires that incorporated materials have actual existence, as they are described

in and at the time of the incorporating reference, is to prevent "disguised delegations."

The other purpose is to insure that persons subject to legislative restrictions are apprised of them at the time they come into effect. At the time the 1980 Act was passed, the maps to which it referred had no official existence and a property owner would not have been able to ascertain what land was within the boundaries of an initial AMA.

The district court ruled that any inquiry into this subject was precluded by the "enrolled bill rule". *See Field v. Clark*, 143 U.S. 649 (1892). The court of appeals held this to be plain error but, rather than reverse, conducted its own *de novo* inquiry and concluded that the Act was not void because the maps in questions had somehow come to be filed on "the date of enactment". *Cherry v. Steiner, supra*, 716 F.2d at 692-93. (App. A, p. A-10).

This is a clear misstatement of the rule to be applied. In Arizona, "[A]n act must be complete in all its terms *when it leaves the legislature . . .*" *State Compensation Fund v. de la Fuente*, 18 Ariz. App. 246, 251, 501 P.2d 422, 427 (1972) (emphasis added). By holding that the "completeness doctrine" may be satisfied so long as the incorporated document comes into being by the "date of enactment," this Court opens the door for the very "disguised delegations" which the rule was designed to prevent. That is graphically illustrated by the facts of this case. *After* the Act was signed by the Governor and became law, some administrative official transmitted to the Secretary of State maps which established the initial active management areas. That official had received no legislative delegation to draw, designate or transmit maps, and his actions in doing so were subject to no legislatively defined standards whatsoever.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted this 9th day of FEB., 1984.

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No. 83-___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLIFTON N. CHERRY, et ux., et al.,

Petitioners

v.

WESLEY E. STEINER, et al.

CERTIFICATE OF SERVICE BY MAIL

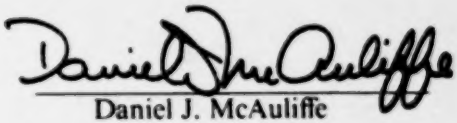
Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is counsel of record for the petitioners herein.

2. That the Petition For A Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit submitted herewith, and the Appendices thereto, have been served upon opposing counsel, in accordance with the provisions of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, this 9th day of February, 1984, to:

James W. Johnson, Esq.
Fennemore, Craig, von Ammon,
Udall & Powers, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.



Daniel J. McAuliffe